

A Azmi bin Harun v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
J-05-88-2004

B GOPAL SRI RAM, DENIS ONG AND TENGKU BAHARUDDIN SHAH
JJCA
22 MAY 2006

C *Criminal Procedure — Appeal — Sentence, against — Appeal by accused that sentence manifestly excessive — No cross-appeal against sentence by prosecution — Whether Court of Appeal empowered to enhance sentence notwithstanding absence of prosecution's cross-appeal — Courts of Judicature Act 1964, s 60(2)*

D *Criminal Procedure — Sentence — Adequacy of sentence — Aggravating factors outweighing mitigating factors — Insufficient attention paid to aggravating factors by trial judge — Whether enhancement of sentence by Court of Appeal warranted*

E *Criminal Procedure — Sentence — Enhancement of — Appeal by accused that sentence manifestly excessive — Whether Court of Appeal empowered to enhance sentence in the absence of cross-appeal — Courts of Judicature Act 1964 s 60(2)*

F The appellant was a Lance Corporal in charge of the cells at the Batu Pahat Police Station. At about 4.30pm on 28 February 2003, one Kannan, who was in Cell F of the lock-up in question, was removed into Cell C, where there were other remanded persons. An assault took place in Cell C as a result of which Kannan died. The appeal record showed beyond reasonable doubt that it was the appellant who moved Kannan from Cell F to Cell C at the request of one of the remandees in Cell C. It was also clear from the evidence that after the assault was over, it was the appellant who removed the deceased from Cell C and took him back to Cell F with the assistance of another person. After the appellant had placed Kannan in Cell F, the appellant was seen showing his thumb in the raised position into Cell F, possibly indicating his approval at what had happened. There was also evidence to confirm that Kannan was in a helpless state with the appellant refusing to intervene. The appellant was originally charged with abetment of murder committed by seven others arraigned with him. At the close of the case for the prosecution, all pleaded guilty to a lesser charge framed under the second limb of s 304 of the Penal Code pursuant to an order of the trial judge. The appellant was sentenced to six years' imprisonment from the date of arrest. He appealed to the Court of Appeal contending that the sentence was manifestly excessive.

G

H

I

Held, dismissing the appeal and enhancing the sentence:

- (1) It was abundantly clear that the trial judge did not direct his mind sufficiently

to the aggravating factors that were presented to him. There were no merits in the instant appeal. The sentence was not manifestly excessive. In fact, this was a case in which the sentence was grossly inadequate (see para 6).

A

- (2) Although there was no cross-appeal against sentence by the prosecution in the instant case, this was not an impediment to the Court of Appeal acting to enhance the sentence if it considered the same to be grossly inadequate. The Court of Appeal was empowered to do so by virtue of s 60(2) of the Court of Judicature Act 1964, which provision does not postulate a cross-appeal by the prosecution for the exercise of the power (see para 7).

B

- (3) The aggravating factors in the instant case outweighed any points in mitigation addressed to the court below. Having regard to the totality of the evidence, and taking into account the plea in mitigation, and weighing them all in the balance, the Court of Appeal was satisfied that the appropriate sentence that ought to have been passed was nine years' imprisonment. Such a sentence sufficiently reflected the gravity of the offence and the role played by the appellant in its commission (see para 10).

C

D

[Bahasa Malaysia summary]

Perayu adalah seorang Lans Korporal yang ditugaskan menjaga sel-sel di Balai Polis Batu Pahat. Lebih kurang pukul 4.30pm pada 28 Februari 2003, Kannan, yang berada dalam Sel F penjara yang dipersoalkan, telah dialihkan ke Sel C, di mana terdapat orang tahanan lain. Satu serangan berlaku di Sel C mengakibatkan Kannan meninggal dunia. Rekod rayuan menunjukkan melampaui keraguan munasabah bahawa perayulah yang mengalihkan Kannan daripada Sel F kepada Sel C atas permintaan salah satu orang tahanan dalam Sel C. Ia juga jelas daripada keterangan itu bahawa selepas serangan tamat, perayulah yang mengalihkan si mati daripada Sel C dan membawanya balik ke Sel F dengan bantuan seorang yang lain. Selepas perayu meletakkan Kannan dalam Sel F, perayu dilihat menunjukkan ibu jarinya dalam keadaan menaik ke dalam Sel F, kemungkinan menunjukkan persetujuannya tentang apa yang berlaku. Terdapat juga keterangan untuk mengesahkan bahawa Kannan berada dalam keadaan yang tidak berupaya dan perayu enggan campur tangan. Perayu pada asalnya dituduh bersubahat dalam pembunuhan yang dilakukan oleh tujuh orang lain yang dituduh bersama beliau. Di penutup kes pihak pendakwa raya, kesemuanya mengaku bersalah kepada pertuduhan yang lebih kurang dibentuk di bawah cabang kedua kepada s 304 Kanun Keseksan menurut satu perintah hakim perbicaraan. Perayu telah dijatuhkan hukuman enam tahun penjara daripada tarikh tangkapan. Beliau telah merayu ke Mahkamah Rayuan untuk menegakkan bahawa hukuman tersebut melampau.

E

F

G

H

Diputuskan, menolak rayuan dan menambah hukuman:

I

- (1) Adalah jelas bahawa hakim perbicaraan tidak mengarahkan mindanya dengan secukupnya kepada faktor-faktor tambahan yang dikemukakan kepadanya. Tiada merit dalam rayuan semasa. Hukuman tersebut tidaklah melampau. Bahkan, ini satu kes di mana hukuman adalah tidak mencukupi (lihat perenggan 6).

- A (2) Meskipun terdapat rayuan balas terhadap hukuman oleh pihak pendakwa raya dalam kes semasa, ia bukan satu penghalang kepada Mahkamah Rayuan yang bertindak untuk menambahkan hukuman itu sekiranya ia membuat pertimbangan ianya tidak mencukupi. Mahkamah Rayuan diberi kuasa untuk berbuat sedemikian menurut s 60(2) Akta Mahkamah Kehakiman 1964, yang mana peruntukan itu tidak mempostulatkan satu rayuan balas oleh pihak pendakwa raya untuk menggunakan kuasa tersebut (lihat perenggan 7).
- B
- C (3) Faktor-faktor tambahan dalam kes semasa melebihi apa-apa peringanan yang dikemukakan kepada mahkamah bawahan. Berdasarkan keseluruhan keterangan, dan mengambilkira rayuan dalam mitigasi, dan mengimbangi kesemuanya, Mahkamah Rayuan berpuas hati bahawa hukuman sesuai yang patut diberikan adalah penjara sembilan tahun. Hukuman sedemikian memadai untuk menggambarkan keseriusan kesalahan dan peranan yang dimainkan soleh perayu dalam pelaksanaannya (lihat perenggan 10).]

Notes

- D For cases on adequacy of sentence, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3102–3131.
For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 639–663.
For cases on enhancement of sentence, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3413–3427.
- E

Cases referred to

Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)

Legislation referred to

- F Courts of Judicature Act 1964 s 60(2)
Penal Code s 304

Appeal from: Criminal Trial No 45–12 of 2004 (High Court, Muar)

- G *Rosli bin Kamaruddin (Rosli Kamaruddin & Co) for the appellant.*
Manoj Kurup (Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

- H
- [1] This is the judgment of the court.
- [2] This appeal is directed against the judgment of the High Court sentencing the instant appellant to a term of 6 years imprisonment from the date of arrest. The complaint before us is that the sentence is manifestly excessive.
- I
- [3] The background to this case may be shortly stated. The appellant was originally charged with abetment of murder committed by seven others arraigned with him. At the close of the case for the prosecution, all pleaded guilty to a lesser charge framed

under the second limb of s 304 of the Penal Code pursuant to an order of the trial judge. There is no appeal by the prosecution against the learned trial judge's order amending the charges.

A

[4] The appellant was at the material time a Lance Corporal. He was in charge of the cells at the Batu Pahat Police station. At about 4.30pm on 28 February 2003, one Kannan a/l Kanthan, who was in Cell F of the lock-up in question, was removed into Cell C, where there were other remanded persons. It is common ground that an assault took place in that cell as a result of which the said Kannan died. We have had read to us a passage from pp 87–88 of the appeal record which shows beyond reasonable doubt that the appellant moved the deceased from Cell F to Cell C at the request of one of the remandees in Cell C. It is also clear from the evidence that after the assault was over, it was the appellant who removed the deceased from Cell C and took him back to Cell F with the assistance of the third accused in the court below. After he had placed the deceased in Cell F, the appellant was seen showing his thumb in the raised position into Cell F, possibly indicating his approval at what had happened. There is also evidence from PW17 and PW22 that the deceased shouted and asked for help and also that he screamed. This confirms that the deceased was in a helpless state with the appellant refusing to intervene.

B

C

D

[5] From the aforesaid facts, it is clear that it was the appellant who played the key role in the death of the deceased. He obviously forgot that his role was to uphold the rule of law and not to act as a criminal himself.

E

[6] From a reading of the learned judge's judgment, it is abundantly clear that his lordship, with respect, did not direct his mind sufficiently to the aggravating factors that were presented to him. Taking into account all the matters which we have adumbrated so far, we are of the unanimous opinion that there are no merits in this appeal. In short, the sentence is not manifestly excessive. Quite the contrary. In our opinion, this is a case in which the sentence is grossly inadequate.

F

[7] Learned counsel drew to our attention that there is no cross-appeal against sentence in this case. But that is not, in our view, an impediment to our acting to enhance the sentence if we consider the same to be grossly inadequate. The powers we have in this respect are encapsulated in s 60 of the Court of Judicature Act 1964. We would in this instance refer to the second subsection of that provision which reads as follows:

G

60(2) At the hearing of an appeal the Court of Appeal may, if it thinks that a different sentence should have been passed, quash the sentence passed, confirmed or varied by the High Court and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed.

H

We noted that the subsection does not postulate a cross-appeal by the prosecution for the exercise of the power. In other words, the power is exercisable even absent a cross-appeal by the prosecution.

I

[8] As we have already said, we find the sentence to be grossly inadequate. We have also said why we think so. The approach we take is based on the following direction

- A given in the case of *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 where Mohd Azmi SCJ said at p 170:

B In assessing the length of custodial sentence, the Court must look at the overall picture in perspective by considering firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence. As stated by James LJ in *R v Ladd & Tristram* [1975] Cr LR 50; Encyclopedia of Thomas Current Sentencing Practice, p 1058:

C We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of criminality involved, and we have to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind, though of course varying in their gravity. Clearly a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts very long sentences are justified.

D [9] It is with the foregoing words in mind that we address the facts of this case. As we have already said, this is an offence which could not have been committed but for the intentional act of the appellant in transferring the deceased from Cell F to Cell C. It was urged upon us by learned counsel for the appellant that we should also take into consideration the absence of any evidence to show that the appellant had heard any screams coming from Cell C. But that invitation must be declined because it lacks logic. After all, it was the appellant who acceded to the request of the 7th accused to move the deceased from Cell F to Cell C. It defies logic and commonsense that the appellant was not aware of what was going on in Cell C after he had moved the deceased there.

G [10] At the risk of repetition we would reiterate that the aggravating factors in this case outweigh any points in mitigation addressed to the court below. What was urged by learned counsel was that the appellant had two wives, nine children, that neither of his wives was working, and that he was the sole breadwinner. With respect, these are not sufficient facts to mitigate the seriousness of the offence committed by the appellant. Having regard to the totality of the evidence, and taking into account the plea in mitigation, and weighing them all in the balance, we are satisfied that the appropriate sentence that ought to have been passed is nine years imprisonment. This, in our respectful view, sufficiently reflects the gravity of the offence and the role played by the appellant in its commission. Accordingly, in the exercise of powers conferred by s 60(2) of the Courts of Judicature Act 1964, we would set aside the sentence of six years imprisonment passed by the judge in the court below and substitute it with a term of nine years imprisonment which is to take effect from the date of the appellant's arrest. The appeal against sentence on the grounds that it is manifestly excessive is, of course, dismissed.

I [11] Before we conclude, we must say this. This act by the appellant is an isolated one. It bears no reflection on the splendid work that the majority of the police force

do in the discharge of their duties. Of late, we notice a predilection among many, including judges, to be unduly critical of the police. While criticism is always welcome we must equally recognize the hard work and dedication that members of the police force display in the discharge of their daily duties.

Appeal dismissed. Sentence enhanced.

Reported by John Paul Simon

A

B

C

D

E

F

G

H

I